

October 13, 2020

Exhibit 23

SOLVING THE MONTANA STOCKWATER RIGHTS PROBLEM

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The Water Use Act (Act), passed by the Montana Legislature in 1973, mainly dealt with free flowing streams, irrigation and ground water. It did not address livestock water use. So why is this an issue? Irrigation from free flowing streams requires a specific point of diversion and a specific place of use. Priority dates and the amount of water allocated to a user become important when drought conditions reduce the amount of water in the stream. Similarly, ground water can become an issue when subdivision withdrawals start impacting the water table. The Water Use Act was primarily concerned with reducing conflicts between irrigators and between ground water users. Stockwater use is totally different and requires its own set of regulations.

With stockwater use there generally is no single or specific point of diversion. The livestock will drink whatever water is available. The source of water can change regularly from a puddle one day to an intermittent stream the next to finally a pit or reservoir when everything else has dried up. Under the law, the rancher has to list all points of diversion (all water sources) which is very time consuming and confusing for both the rancher and the regulatory agency.

Most of the rangeland in Eastern Montana is devoid of live streams. Water for livestock is primarily derived from snowmelt and rain. As a result, there are few conflicts over water between neighbors since each ranch supplies most of the water that is consumed by its livestock. In order to have water available to the stock in the drier months, some of the spring deluge has to be captured and stored. Originally, dams were constructed on the drainages. They were expensive and often washed out. Lately, relatively small pits on smaller drainages have proved to be more effective and practical.

The stockwater filing problem became apparent shortly after the newly formed Department of Natural Resources and Conservation (DNRC) began refiling all the water rights. They were quickly swamped and one of the problems was that stockwater filings took a lot of time and, in most cases, were not contentious. They sent a note to the legislature addressing the problem and suggesting three possible solutions. The first was to address the stockwater issue with new legislation. The second was to give the department more money so they could handle the huge workload. And the last was to exempt the stockwater rights from the current filing program. They opted for the third suggestion which, apparently, was illegal according to the McCarren Amendment that has been interpreted by the courts to declare that all water users must be included in any adjudication. What should have been done then and must be done now is for the legislature to properly address the stockwater issue.

Rather than dwell on the misinterpretations of the Act and the outright wrong and, in some cases, illegal actions taken by the state bureaucrats empowered to implement the Act, it would be more productive to identify the problems and recommend solutions.

PROBLEM 1: Loss of vested water rights:

For some reason, the framers of the Water Use Act dropped the word "vested" from the Act and replaced it with "existing". A vested right is legally defined as a property right while an existing right is not. The Act stated, "'existing water right' means a right to the use of water that would be protected under the law as it existed prior to July 1, 1973." However, it never defined or explained what laws existed prior to July 1, 1973.

Nor did it explain what happened to the rancher's vested water rights. This change of words enabled the bureaucrats to extinguish these property rights without legally mandated due process or just compensation as required by the U.S. Constitution. The legislature needs to clearly describe "the law as it existed prior to July 1, 1973" and reinstate the ranchers' vested property rights.

PROBLEM 2: Priority Date:

Montana is a Prior Appropriation Doctrine state which means "first in time, first in right". Further, the law declares the user of the water and not the owner of the land owns the water right. Many of the ranches in Montana were established and have been continuously using the available water for over 100 years. By law, the priority date should be when the livestock first used the water on the ranch's customary range and, by law, this right cannot be extinguished without due process.

The DNRC has interpreted the Act to mean that when a reservoir or pit is constructed, it is a new use of the water and the priority date is the date the structure was first used. Livestock on the range primarily use the surface runoff water which is the same water whether in a puddle, intermittent stream or containment. The construction of a storage structure is not a new use. The law must focus on the water and not on the point of diversion. This could be accomplished by identifying a pasture or federally managed (BLM) allotment and declaring all waters within that enclosure to be available to the livestock. The only information needed would be; 1) the date of first use, 2) a description (map) of the boundary fence around the pasture or allotment, 3) the historic number of livestock using the pasture or allotment and 4) the season of use. With this information the Water Court would calculate the acre-feet required to satisfy the water needs of the animals using the pasture or allotment and issue the appropriate water right.

PROBLEM 3: Giving Montana's water rights to the Federal Government:

The DNRC, after doing everything in their power to prevent ranchers from filing on their vested water rights and then declaring them abandoned, encouraged the Bureau of Land Management (BLM) to file on these waters. The Montana Water Use Act says the water must be diverted and put to beneficial use before a water right is granted. The courts have upheld that livestock use meets this requirement. Since the BLM has never used and has no intention of ever using the water, it cannot legally obtain a Montana water right. The bureaucrats have tried to say the rancher's livestock are the BLM's beneficial use, but that ploy has never survived any legal challenges at the state or federal level. The legislature must put this bogus attempt at a federal water grab to rest by passing legislation similar to that passed in 2017 in Idaho.

Hopefully, the Montana legislators will do the right thing and pass legislation that will correctly address livestock water rights so Montana citizens will not have to resort to expensive litigation to protect their property rights. The current adjudication of water basins must be halted until the stockwater water rights issue is resolved.

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